No. 5622

United States Circuit Court of Appeals

For the Ninth Circuit.

GEORGE DORAN, JR., HAROLD GRAVES and J. D. (Jack) MORRISON,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Brief of Appellee

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CASES CITED

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STATEMENT OF THE CASE

This is an appeal from the United States District Court wherein there was judgment and sentence on conviction of appellants George Doran, Jr., and Harold Graves for unlawful possession of intoxicating liquor and maintaining a nuisance in violation of the National Prohibition Act, and on conviction of appellant J. D. (Jack) Morrison for unlawful manufacture of intoxicating liquor, possession of property designed for the manufacture, possession of liquor and maintaining a nuisance.

Appellant's statement of facts is inadequate. Prohibition Agents Myers, Collins, Denny and Wyoming State Enforcement Officer Owens drove up to the Morrison ranch on April 18, 1928. It appears that they arrived about noon and defendants Graves, Doran and Mrs. Doran (Tr. 98) were eating dinner. Agents Collins and Denny went to the back door. Agent Collins testified that one of the defendants, later identified as defendant Graves (Tr. 42) came to the door and told the officers to go ahead and make a search (Tr. 62) and his testimony was corroborated by that of Agent Denny (Tr. 35). The ranch is situated in rough country in a little basin and consists of about one-hundred and sixty acres (Tr. 36). Denny testified that he knew that the defendant Morrison had lived there since 1927 (Tr. 36). The agents followed the tracks of a two wheel cart and a "pair" of mules from the house about three-quarters of a mile southeast and found a still house that had just been completed, which contained mash vats, pressure tank and burner and then followed the same tracks in an easterly direction where they found another still house in which were found a number of mash vats, about seven-hundred gallons of mash (Tr. 35-36), and three stills in the sage brush about fifty feet from the still house (Tr. 36, 51).

The agents now returned to the ranch buildings where they found two 50-gallon barrels full of moonshine whiskey buried in the earth about ten feet from the corner of the chicken house, two 50-gallon barrels that had contained whiskey buried in the blacksmith shop, and two vats in front of the barn or black-smith shop, that were similar to those found at the still sites (Tr. 35, 45).

The chicken house was forty or fifty yards from the house (Tr. 60).

The government witnesses stated that there were two mules in the barn and a two-wheel cart in the yard (Tr. 37) and that mule tracks and tracks of a kind that would be made by a cart of this character led to both still sites (Tr. 36) from the ranch premises. Agent Denny said it appeared *that these mules had been over the trail four or five times in the last two or three days* (Tr. 44). *The tracks went no further than to the location of the stills* (Tr. 44) and *there is evidence that the trails themselves went no further.* (Tr. 52, 56).

The government's agents further stated that the still house south of the ranch had been constructed recently. They stated that there were marks or tracks about the still house made by a tractor used to "scrape out the new still house" (Tr. 37, 56, and 57). The tractor was found near the ranch buildings with lugs on the wheels which made tracks corresponding to the tracks found at the still site (Tr. 37, 57). There is further testimony to indicate that there was a pipe line running from one of the still houses to a point near the dwelling (Tr. 47). The surveyor testifying for defendants said there was no connection between the ranch water pipe and the still sites, but his testimony indicates that a water pipe extended from one of the ranch irrigation ditches from a point inside of the ranch premises to one of the still sites (Tr. 68).

The agents testified that the nearest house where people lived was three and one-half to four miles from the premises (Tr. 49). The surveyor testifying for de-

fendants said he did not think there were other people living in the neighborhood and that it was about two miles to the nearest house (Tr. 69). He stated that some days after the date of the offense charged, he saw "sheep wagons in the neighborhood" (Tr. 69).

Defendants Graves and Doran testified in their own behalf, stating that they had worked on the ranch for Morrison for about two months (Tr. 72, 87), that they had been fixing the water line (Tr. 73), broadcasting alfalfa, (Tr. 79) making ditches (Tr. 80), fixing fences (Tr. 80), and other ranch work. They stated they used the tractor and the mules found on the premises in the farm work and in making ditches (Tr. 84, 89). Defendant Graves said that Morrison came to the ranch once or twice a week (Tr. 84). Doran said Morrison came three times "pretty nearly every week" (Tr. 96). They denied any knowledge of the presence of liquor on the premises (Tr. 74, 88), or of the stills and still sites (Tr. 74, 89), and said *while the place where one of the sites is located could be seen from the barn,* they had never seen the still house (Tr. 81) or the trails leading to them (Tr. 82, 95, 96). There was no evidence that persons other than these defendants were on the premises during the times the defendants Doran and Graves worked on the ranch.

ARGUMENT

The first question is whether the search of the ranch premises, which disclosed the two fifty-gallon barrels of whiskey buried near the chicken house, was legal.

Appellants concede in their brief on Page 5: "We

have no complaint to make as to the search of the still sites, for they were not within the boundary lines or fence line of the defendant's ranch." On page 7: "I contend that the immediate farm yard is appurtenant to and a part of the home and residence."

The Search Was Legal

A search without a warrant of any building or property other than a dwelling is valid without a warrant if on reasonable or probable cause. Carroll v. United States, 267 U. S. 132, 162. In the Carroll case, supra., the Court defined probable cause.

> "That is to say that the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in the automobile which they stopped and searched."

Probable cause was early in the history of this country defined as existing: "When there are circumstances sufficient to warrant suspicion even though not sufficient to warrant condemnation." (The Thompson, 3 Wall, 155, Locke v. United States, 7 Cranch 337).

In the case of Schnorenberg v. United States (7th Cir.) 23 F. (2d) 38, 39 the rule is stated:

> "But it is not true that the search of 'any other building or property' can only be made under a search warrant. The Courts have repeatedly held that such searches, without warrant, are valid, if made upon reasonable or probable cause."

The agents here had probable cause. It appears that they left the ranch premises, *and on adjoining lands* found two still sites, certain stills, mash and other implements designed for the manufacture of liquor. It is conceded that they were not trespassing when they discovered the stills, and as was said in McGuire v. United States, 273 U. S. 95, at 99:

> "Even if the officers were liable as trespassers ab initio, which we do not decide, we are concerned here not with their liability but with the interest of the Government in securing the benefit of the evidence seized, so far as may be possible without sacrifice of the immunities guaranteed by the Fourth and Fifth amendments."

The agents upon finding the stills had discovered an unlawful enterprise; two still houses, mash in the process of fermentation, three stills and other materials and equipment designed for the unlawful manufacture of large quantities of intoxicating liquor.

> *"The capacity of the stills discovered would indicate a large product, and the officer might reasonably infer that this product was stored somewhere."* (Italics ours.)
>
> (Schnorenberg v. United States, Supra., at p. 40).

The agents saw mule and cart tracks leading from the still to the ranch buildings, the tractor near the buildings with wheels which would make tracks similar to those observed at the still sites, the mules in the barn, and the cart in the yard.

In addition it is not contradicted that two vats were found by the barn constructed "along the same line and made of the same kind of lumber as the agents found at the two still houses. (Tr. 35, 55). The agents said they were new and had just been constructed while the defendants said they were water tanks (Tr. 83) and on the premises when these defendants came there. (Tr. 88.) These vats, similar to those at the still sites being found on the premises, would be additional evidence to give the officers reasonable and probable cause to search the premises.

The probative value of tracks leading to a supply of liquor is recognized in Gentili v. United States (9th Cir.), 22 F. (2d) 67. There the evidence was:

> "Upon a search the officers discovered no liquor, but in the kitchen some empty bottles and whisky flasks, and on the table whisky glasses. Finding the door to room No. 15 locked, they obtained from defendant the key. Upon opening the door, the room appeared to be unoccupied, and was "dusty and dirty." Visible on the dusty floor were *"well-worn paths"* leading to a window facing upon what is referred to as an alcove. Raising the shade and the window, they observed that the window sill was *"worn and scarred."* Passing through the window, they followed a *similar path* on a roof connecting the Tripoli Hotel with an adjoining building, 12 feet away, known as the Alaska Hotel, and operated by a Mrs. Harris. Opening this window they kept it up by inserting in a hole in the sash appropriate for the purpose, a nail which they found lying on the sill. Entering a room through this window, they observed a similar path or trail leading to a closet

door, which was locked. Upon opening the door they found in the closet approximately 4½ gallons of distilled spirits and 27 bottles of beer. The door from the room to the corridor of the hotel was closed, a chair having been so placed under the knob that it could not be opened from the outside." (Italics ours.)

Although no liquor was found on the defendant's premises this Court held the above evidence would support conviction for possession of intoxicating liquor and maintaining a nuisance.

Having probable cause to search the ranch premises, the question is presented whether the earth near the chicken house forty or fifty yards from the dwelling comes within the protection of the constitutional restriction against searches and seizures.

The Supreme Court has said:

"The special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields. The distinction between the latter and the house is as old as the common law. 4 Bl. Comm. 223, 225, 226. (Hester v. United States 265 U. S. 57.)

In Dulek v. United States, 16 F. (2d) 275, the Circuit Court of Appeals of the Sixth Circuit decided that a cabin containing a still and its appurtenances, concealed in a wooded swamp on accused's 40-acre farm, 230 feet from his dwelling, was not part of the curtilage, and that it was not within the protection of the constitutional restriction against search and seizure, citing Hester v. United States, supra.

In Schnoreberg v. United States (supra.) the Court said:

> *"The chicken coop on the farm of Herman and the barn on that of Jacob were buildings other than their private dwellings, and the statute left the way open for searching each of these places without a warrant, if the search was made without malice and upon probable cause."* (Italics ours.)

In view of the foregoing we submit that appellants' objection to the legality of the search is without merit.

Consent to Search

As to consent to the search, appellants correctly state on page 1 of their brief "There is a dispute as to whether or not the defendants Graves and Doran told the officer to go ahead and make the search. Some of the officers say that they were given permission. The defendants say not. But there is no evidence in the case that Morrison authorized the search, or authorized the two men working for him or any one else, to give that permission."

The record does not disclose whether the Court denied the motion to suppress herein on the the theory that defendants had consented to the search and hence could not object or upon the theory that the constitutional restriction against searches did not apply to the place where the liquor was found. The protection against searches and seizures may be waived by consent, and a hired man left in charge of a ranch can properly give permission to the officers to search. (Raine v. United States (9th Cir) 299 Fed. 407, 411) (certiorari denied 266 U. S. 611).

The evidence indicates that consent was given, the agents so testified (Tr. 35, 62) and while Graves denied it (Tr. 75) Doran said when asked if the agents requested permission to make a search, "Not that I know of." (Tr. 91). And Mrs. Doran, the lady present at the house when the officers came said, "I don't recall." (Tr. 98). Although all three were present when the officers requested permission (Tr. 75). The Court denied the motion to suppress. In Baldwin v. United States, (5 F. (2d) 133, 134) it is said:

> "According to some authorities, his finding upon a preliminary question of admissibility is conclusive and will not be reviewed; *but, in any event, his finding carries the same weight as the finding of a jury upon a disputed issue of fact and will not be disturbed by a reviewing court unless the error is manifest.*" (Italics ours.)

And in Schutte v. United States (6th Cir.) 21 F. (2d) 830, the court said:

> "In the search of a dwelling made by consent, no search warrant is necessary. Gatterdam v. U. S., C. C. A. 6, 5 F. (2d) 673, 674. As to whether such consent was freely given, there was a question of fact. The Court found as a fact that consent was given and without any duress; this conclusion was amply supported by the evidence; no question of law thereon remains for review."

The Evidence is Sufficient

There is substantial evidence to support the verdict of the jury in finding the defendants guilty.

> "In considering the question whether there has been error in refusing a directed verdict for the defendant on a criminal trial, this court can inquire only whether there was any evidence to sustain the verdict."
>
> Cohen v. United States (9th Cir.) 214 Fed. 23, 27.

And in Fitzgerald v. United States (6th Cir.) 29 F. (2d.) 881 the rule is stated that; "In considering the motion for a directed verdict, we must take that view of the evidence most favorable to the appellee".

The evidence shows that the defendant Morrison has owned or in possession of the place since 1927 (Tr. 36); that he came out there several times a week (Tr. 84, 96) and would stay a day or over night and help with "all the work around there" (Tr. 96); that the defendants Doran and Graves had worked on or about the ranch for two months or more (Tr. 72, 87); that there was mash and stills at still sites near the ranch, whiskey buried near the chicken house on the ranch premises (Tr. 35, 45), tracks from the ranch premises to the still sites (Tr. 36), which lead no further (Tr. 44) made by mules, a tractor and a cart found on the ranch (Tr. 37). The defendants admitted they were using the mules and the tractor (Tr. 84, 89) and the testimony does not even suggest that anyone else used them. There is no evidence that other people were on or about the ranch premises, and defendant Doran said, *he, Graves and Morrison were the only men there* (Tr. 96). The defendants Doran and Graves merely denied any knowledge of the still sites or liquor (Tr. 74, 88, 89), *although the location of one of the still sites could be seen from*

the barn on the ranch premises (Tr. 81). It affirmatively was shown that the nearest house was from two to four miles away and it was not shown that anyone lived there (Tr. 49, 69).

The Court in Pleich v. United States (9th Cir.) 20 F. (2d) 383, 384) said:

> "It is true that the evidence showed no actual sale or possession by Pleich; but as it appeared that he was the sole lessee and proprietor of the resort, *and worked therein every day,* and that liquor was kept for sale on the premises, *the jury was fully justified in concluding that he must have known that liquor was kept and sold by his employees.*"

The case of Parks v. United States (4th Cir.) 297 Fed. 834, would seem conclusive of the case at bar. Therein it was held, quoting from the syllabus:

> "In a prosecution for unlawful possession of liquor, defendant's guilt may be inferred from the finding of liquor in an unusual place of concealment on his premises, though the only direct testimony was to the effect that he had no knowledge of it."

Alse see Gentili v. United States (9th Cir.) 22 F. (2d) 67, heretofore cited herein.

The testimony of defendants is interesting and significant. Thus Graves testified that prior to going out on the ranch he had been working around pool halls and picking up odd jobs and that since the time of his arrest he had worked about a week and four days (Tr. 76, 77).

And Doran testified that he had worked for farmers

"lots of times" but when questioned further said "two or three years ago." (Tr. 92.)

Yet these two defendants were employed, Doran and his wife at $125.00 per month, so he states (Tr. 93) and Graves at $75.00 per month. (Tr. 81.)

They were on the ranch two months. Graves testified on cross-examination.

Q. Now, you know where this still was found up there, don't you? (Indicating on plat.)

A. I saw the smoke where they burned them.

Q. Well, you knew where that place is located?

A. Yes, sir; I do.

Q. You can see that from the barn, can't you, or not?

A. *You could see the location, but you could not seen any buildings or anything.*

Q. *Yes, you could see the location where it was?*

A. *I know just about where it was."* (Tr. 81.)

* * * * * * * * * * * *

Q. Now, did you ever notice when you went out this road that leads to the ranch-house, a trail turning off up toward that still?

A. No, sir; *I was never out there,* only about twice.

* * * * * * * * * * * *

Q. I ask you if you saw any trail leading down

to that still-house? Were you ever down to that still-house?

A. *No, sir.*

Q. That is just across the fence, isn't it; the south fence of the Morrison place?

A. Why, I guess it is outside the fence.

Q. And there is a gate that goes through there somewhere, isn't there?

A. Not as I know of.

Q. Never saw a gate down there?

A. No, sir.

Q. Is there a gate over here, down in this part, along this fence to the east, this edge here, to the eastern part?

A. Yes, sir; there is a gate down there.

Q. And you have gone through that gate?

A. Yes, sir.

Q. And doesn't that lead you down to this still site, the trail?

A. I never saw the trail." (Tr. 82, 83.)

Doran said on cross-examination:

"Q. Did you ever see a trail leading from that road—from this road to the still-house up here at the top?

A. No, sir.

Q. *You never saw that trail at all?*

A. *No, sir.*

Q. Were you ever up at the still-house?
A. No, sir.

Q. You worked right up here, did you not?
A. Over here. (Indicating on plat.)

Q. Did you ever see the trail leading from the gate over here on this side, angling down through here to the still-house at the south?
A. No, sir.

Q. Never saw that?
A. No, sir.'' (Tr. 95, 96.)

The jury were instructed that if the defendants had knowledge of the liquor being on the premises they could be found guilty. Counsel for appellants finds no quarrel with the instruction but states there was no evidence to establish that they had knowledge.

The case is not unlike Swenzel v. United States (2nd Cir.) 22 F. (2) 280) wherein the court said:

> ''There seems every reason to believe that Swenzel testified falsely about the ownership of this shirt, and also about his ignorance of what was going on in a place next to his residence, where a brewery was being installed and trucks were coming and going. He was unable to identify any other persons connected with the enterprise, and he and the defendant Bindel with another defendant Schwertz, against whom the information was dismissed, *were the only persons identified who were about these premises.*'' (Italics ours.)

The language of the Court in the case of United States vs. Houghton, 14 Fed. 544 at page 547, is pertinent:

> "There is great misapprehension in the popular mind on this subject. There seems to be a prevalent notion that no one is chargeable with more knowledge than he chooses to have; *that he is permitted to close his eyes, when he pleases, upon all sources of information,* and then excuse his ignorance by saying that he does not see anything. In criminal as well as civil affairs every man is presumed to know everything that he can learn upon inquiry, when he has facts in his possession which suggest the inquiry." (Italics ours.)

There is other significant evidence which was no doubt considered by the jury. The testimony that the defendants Graves and Doran were working on the ranch at a cost of $200 per month to Morrison; a ranch which Denny said had ten acres plowed (Tr. 39, 40), the surveyor said had 60 acres in alfalfa, (Tr. 70) Doran said had about 100 acres in hay (Tr. 95); on which there were 30 or 35 cattle (Tr. 80), two pigs (Tr. 93), two milch cows, six horses and a team of mules (Tr. 94); and the testimony that they had spent 'a couple of weeks' installing a water wheel (Tr. 94), and testified at length as to fixing certain water pipes (Tr. 78, 89, 94) wherein among other things it was stated that about 400 yards of the pipe was underground and had to be dug up, while the surveyor, testifying for defendants, said he could testify as to the position of the water pipes from an examination made shortly after the date of the offense charged because "*grass was grown all*

over them.'' (Tr. 69.)

In view of these and the other circumstances surrounding the presence of the defendants on the ranch, their professed ignorance of the existence of the still near the ranch or the liquor on the premises, coupled with their admission that they were the only ones on the premises, and the lack of any evidence from which it could even be inferred that third persons had been or were about the premises, we submit there is substantial evidence to support the verdict of the jury.

In Donegan v. United States 296 Fed. 843 at 849 the Court said:

> ''Incriminating evidence is strengthened by a failure to adduce rebutting evidence tending to prove that the state of facts disclosed is consistent with innocence, when it properly may be inferred that exculpatory evidence would be forthcoming if there were an absence of guilt. United States ex rel. Bilokumsky v. Tod (Nov. 12, 1923), 263 U. S. 149, 44 Sup. Ct. 54, 68 L. Ed.....''

For the foregoing reasons, we respectfully submit that the judgment of the trial court should be affirmed.

Respectfully submitted,

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